Googleopoly IX: Google-Motorola's Patents of Mass Destruction
Reneging on Competitively-Essential Contract Arrangements is Patently Anti-Competitive

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The anti-competitive seriousness of Google-Motorola's predatory patent litigation tactics has prompted a second antitrust investigation of Google by the **EU** and the **DOJ/FTC**. The behavior has also prompted a Senate Antitrust Subcommittee oversight **hearing**: *Impact on Competition of Exclusion Orders to Enforce Standard Essential Patents*. This latest antitrust investigation into Google's business practices is in addition to the ongoing antitrust investigations into Google's deceptive and predatory *search* practices in the **EU**, the **FTC**, **South Korea**, **India** and **Argentina**.

In response to smart-phone patent-infringement lawsuits from Apple/Microsoft against Google-Motorola and its Android partners, Google **acquired Motorola's** patent portfolio ostensibly to better **defend its Android** operating system in ongoing patent litigation, licensing and settlement negotiations. However, an unprecedented patent-defense strategy by Google-Motorola and its Android device partners, involving reneging on their contractual commitments to license standard-**essential patents** (SEP) at fair, reasonable and non-discriminatory terms (**FRAND**), has mutated many critical pro-competitive standard essential patents into anti-competitive **patents of mass destruction.** This new Google strategy, and possible anti-competitive **collusion** among Android partners defending Android, potentially threatens the competitive viability of much of the world's wireless device ecosystem.

Google, via its Motorola acquisition, now owns many FRAND-SEPs for cell-phones, WiFi, wireless video and video compression that comprise an essential part of the technological foundation that enables much of the multi-hundred-billion dollar wireless device industry. Google and its Android partners have invented a new serious antitrust problem, by effectively declaring that they can unilaterally renege on irrevocable licenses/contracts on which all their competitors depend to compete and to produce products, for the apparent **purposes** of gaining **negotiating leverage** to defend Google against **lawsuits** that Google's Android products are based on stolen intellectual property.

The "patents of mass destruction" metaphor is particularly apt here. Even in war there is widely-accepted agreement of what behavior is out-of-bounds. For example civilized societies universally respect the immunity of diplomats and commit to not use chemical/biological weapons of mass destruction. In threatening to revoke heretofore irrevocable SEP licensing contracts, Google-Motorola and its Android partners are threatening to destroy much of the competitive wireless device ecosystem by claiming that essential industry-standards that were previously viewed as certain, settled, and foundational are no longer that. Think of SEP-FRAND licenses as widely-accepted treaty commitments with everyone in the space that these SEPs will never be used in a mass destructive way.

A very telling indicator that Google-Motorola and its Android partners are dangerously out-of-bounds here is that no company is coming to their defense in the multiple cases in which this dispute is playing out in multiple forums around the world.

As I predicted last September, Google's unabashed public threats to defend Android by deploying acquired Motorola patents to thwart pre-existing patent litigation against Android, have proven seriously problematic from an antitrust perspective. Specifically, in "**Why Google's Motorola Patent Play**

Backfires," I predicted antitrust authorities would approve the Motorola transaction, but have problems with Google's predatory plans for its acquired Motorola patents.

Tellingly, in approving Google-Motorola both the EU and the U.S. DOJ officially warned of their concerns about Google's patent tactics. The DOJ said concerning Google-Motorola that it: "*will not hesitate to take appropriate enforcement action to stop any anti-competitive use of SEP rights*." Since those initial warnings both the EU and the U.S. FTC have launched formal investigations of Google-Motorola's alleged anti-competitive abuse of standard essential patents.

It is even more telling that when the DOJ asked the key warring players in the smart phone patent war, Apple, Microsoft, and Google to all formally commit to not anti-competitively abuse SEPs; Apple and Microsoft did formally commit, but Google did not. Specifically, the DOJ said: "*The division's concerns about the potential anticompetitive use of SEPs was lessened by the clear commitments by Apple and Microsoft to license SEPs on fair, reasonable and non-discriminatory terms, as well as their commitments not to seek injunctions in disputes involving SEPs. Google's commitments were more ambiguous and do not provide the same direct confirmation of its SEP policies.*"

If the real impetus for Google to acquire Motorola was to protect Android with Motorola's patents as Google originally claimed, and Google's plans for Motorola's patents ultimately are determined to be anti-competitive, the Motorola acquisition will have backfired badly on Google by adding fuel to the Google antitrust investigation and by losing the over-riding benefit of the very costly Motorola transaction.

The purpose of Googleopoly IX (see www.Googleopoly.net for I-VIII) is not to catalogue or analyze the cacophony of patent lawsuits that comprise the smart-phone patent war, but to cut through the exceptionally arcane, complex and slow-moving subject area of patents and technology standards, **to spotlight the main antitrust event** here. The main event is the unprecedented, overriding and extremely destructive new anti-competitive and potentially collusive behavior by Google-Motorola and its Android partners of reneging on foundational SEP patents mid-game with the intent to pressure competitors to forgo their due process rights in court and drop their pending patent claims against Android.

Don't let the many patent court battles that are playing out in different jurisdictions around the world among different players and patents, distract from the serious anti-competitive pattern of Google-Motorola behavior here that naturally has attracted intense antitrust scrutiny and concern.

Why is this particular behavior so mass destructive from a competition perspective? In the U.S., a patent is a constitutionally-authorized, temporary exclusive right to "discoveries," in order to "promote the progress of science." Patents are routinely litigated in court, as the courts have long been the primary adjudication forum to fairly judge if a patent was in fact infringed and if so, what penalty/remedy the infringement warrants.

The term "essential" in standard *essential* patents is critical to understanding the antitrust context. Here the owners of standard "essential" patents have willingly contracted to irrevocably license their patent to be an industry standard in return for everyone in the budding industry agreeing to pay fair, reasonable and non-discriminatory price, terms and conditions (FRAND). **In effect, the patent holder and their competitors have mutually-agreed to create a de facto "monopoly essential facility" for the industry, which is only workable and not anti-competitive precisely because the competitors have the enforceable contractual assurance that they can access this FRAND patent license,** whenever they need to for the life of the SEP.

What Google-Motorola and their Android partners are threatening in backroom negotiations and publicly in court by seeking injunctions to block usage or import of products using the SEP inventions, is to block access to this contractually-created "essential facility," knowing full well that if successful, it would force the competitors' products from the market and foreclose competition completely -- unless authorities/courts intervene to prevent it.

It is hard to imagine a more anti-competitive type of behavior given that it is deceptive, predatory, and massively destructive to well-established competition that would thrive but for this anti-competitive behavior. Simply, this is a classic example of Google illegally trying to pull the rug out from under all their wireless competitors.

Conclusion

The big takeaway here is how much patent infringement risk Google and its Android partners must believe Android faces that they would resort to the unprecedented practice of mutating pro-competitive standard essential patents into **patents of mass destruction** to competition. This extreme, very-hard-to-defend, destructive strategy by Google and its Android partners does not appear to be rational market behavior, *unless* Google and its Android partners believe that they are guilty, or likely to be found guilty in court, of mass infringement of competitors' property rights in rushing Android to market. This appears to be desperate behavior of entities that feel cornered and are fearfully lashing out at everyone without regard for the consequences.

The DOJ in **asking** the major players in the smart phone patent war, Apple, Microsoft, and Google, to commit to compete fairly and not destructively with standard essential patents, made it clear this was serious anti-competitive behavior. The Senate Judiciary Committee Chairman **wrote** the DOJ to be vigilant in not allowing standard essential patent licensing commitments to be abrogated anti-competitively. And several Senators, including the Senate Antitrust Subcommittee Chairman and Ranking Member **wrote** the ITC over the same concern. This is obviously a big potential anti-competitive problem requiring vigilance and resolution by antitrust authorities.

Recommendations

1) Antitrust authorities around the world must vigilantly enforce the sanctity of common law contract commitments that are essential to competition. Specifically, without rule-of-law enforcement of the contracts that undergird standard essential patents, wireless device competition and consumers are at serious risk.

2) Antitrust authorities should investigate to determine if the facts indicate that there was any anti-competitive collusion among Google and Android partners to pursue this unprecedented and apparently concurrent strategy among multiple Android partners to exclude competitors' access to standard essential patents by reneging on FRAND licensing contracts. **Contempt for pro-competitive contracts appears to be an anti-competitive pattern for Google-Android, worthy of further investigation** given that Android is activating a million devices daily. Importantly and tellingly, Skyhook Wireless has related patent and unfair trade practices lawsuits being litigated in court, alleging that Google infringed on patents and **forced Android partners to break *signed* contracts with Skyhook Wireless**. (See **Googleopoly VII** and Skyhook Wireless' **patent-infringement** and **unfair practices** complaints.)

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